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Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Summary

The ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment surveys the work of the Subcommittee during 2015.

Following a brief introduction, section II provides an update on developments relating to the Optional Protocol to the Convention against Torture system, including visits, the increase in States parties and in designated national preventive mechanisms, and the operation of the Special Fund established by the Optional Protocol.

Section III highlights areas of cooperation between the Subcommittee and other international and regional bodies and civil society.

Section IV provides information concerning the Subcommittee's working practices, including preliminary thoughts on some substantive issues.

Section V sets out the Subcommittee's views on prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons.

Section VI reflects on the Subcommittee's 2016 programme of work and the practical challenges facing the Subcommittee as it continues to develop its work.

The annex contains a compilation of advice provided by the Subcommittee in 2015 in response to requests from national preventive mechanisms.

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I. Introduction

1. Pursuant to article 16 (3) of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ninth annual report, covering the Subcommittee's activities from 1 January to 31 December 2015, was adopted by the Subcommittee at its twenty-eighth session, in February 2016.

II. Year in review

A. Participation in the Optional Protocol system

2. As at 31 December 2015, 80 States were party to the Optional Protocol.[1] In 2015, four States ratified or acceded to the Optional Protocol: Mongolia (12 February), South Sudan (30 April), Rwanda (30 June) and Belize (4 September).

3. The pattern of regional participation was as follows:

African States	18
Asia-Pacific States	9
Eastern European States	19
Latin American and Caribbean States	15
Western European and other States	19

4. The regional breakdown of the 18 signatory States was as follows:

African States	12
Asia-Pacific States	1
Eastern European States	0
Latin American and Caribbean States	1
Western European and other States	4

B. Organizational and membership issues

5. During the reporting period (1 January-31 December 2015), the Subcommittee held three one-week sessions in Geneva: the twenty-fifth session (16-20 February), the twenty-sixth session (15-19 June) and the twenty-seventh session (16-20 November).

6. At the fifth meeting of States parties to the Optional Protocol, held on 23 October 2014, 13 members were elected to fill the vacancies arising in respect of members whose terms of office would expire on 31 December 2014. The terms of office of the newly elected members commenced on 1 January 2015 and will expire on 31 December 2018.[2] Before assuming their duties, the newly elected members made a solemn declaration at the opening of the twenty-fifth session of the Subcommittee.

[1] See www.ohchr.org/EN/HRBodies/OPCAT/ Pages/OPCATIndex.aspx.
[2] See www.ohchr.org/EN/HRBodies/OPCAT/Pages/Membership.aspx.

7. The Bureau of the Subcommittee was elected at the twenty-fifth session. The Chair was Malcolm Evans. The Vice-Chairs were: Enrique Andrés Font, Visits; Suzanne Jabbour, External Relations; Paul Lam Shang Leen, National Preventive Mechanisms; and Aisha Shujune Muhammad, Jurisprudence and Subcommittee Rapporteur.

8. Following the twenty-fifth session, the heads of the regional teams were: Africa, Hans-Jörg Bannwart; Asia and the Pacific, Lowell Goddard; Europe, Mari Amos; and Latin America, Felipe Villavicencio Terreros. The regional teams examine the implementation of the Optional Protocol within their region, reporting to the Subcommittee in plenary, with recommendations as appropriate.

9. The Subcommittee's permanent and ad hoc working groups met at each session during 2015. Further information on the meetings is provided in section IV below. Meeting in subgroups and working groups facilitates discussion of a broad range of issues, in a more focused and participatory fashion.

10. On 18 June, the International Rehabilitation Council for Torture Victims organized a capacity-building seminar for the Subcommittee on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

C. Visits conducted during the reporting period

11. At its twenty-sixth session, the Subcommittee reviewed its approach to visits. In order to maximize their preventive potential, the Subcommittee decided that future visits would not be limited to a single aspect of prevention, but would instead focus on all the issues the Subcommittee deemed it appropriate to address. Consequently, as of 19 June 2015, the Subcommittee would not categorize visits as taking different forms, except for short follow-up visits undertaken in the wake of a visit in accordance with article 13 (4) of the Optional Protocol. The Subcommittee would, however, continue to identify particular objectives for each visit, reflecting what it considered to be most appropriate in the specific circumstances.

12. The Subcommittee conducted eight official visits in 2015.

13. It recommenced and concluded its visit to Azerbaijan in accordance with its mandate under article 11 (a) of the Optional Protocol (16-24 April), reflecting its practice as set out in paragraph 3 of its statement on the obligations of States parties to facilitate the visits of the Subcommittee (CAT/OP/24/1). The visit had previously been suspended on 14 September 2014.

14. The Subcommittee undertook seven visits in accordance with its mandate under articles 11, 12 and 13 of the Optional Protocol, to Nauru (4-8 May); Guatemala (11-20 May); the Philippines (25 May-3 June); the Netherlands (28-31 July); Italy (16-22 September); Turkey (6-9 October); and Brazil (19-30 October). A planned visit to Benin was postponed until 2016 owing to operational issues.

15. Further information on the above-mentioned visits is available in the press releases issued following each visit.

D. Dialogue arising from visits, including publication of the Subcommittee's reports by States parties and national preventive mechanisms

16. The substantive aspects of the dialogue arising from visits are confidential. Reports are made public only with the consent of the recipient. By the end of 2015, the

Subcommittee had transmitted a total of 39 visit reports to States parties and national preventive mechanisms, including 4 within the reporting period to Ecuador, Maldives, Malta and Nauru. Twenty-one Subcommittee visit reports had been made public following requests from recipients under article 16 (2) of the Optional Protocol, including one within the reporting period to the national preventive mechanism of Ecuador. While fully respecting the principle and right of confidentiality provided for in the Optional Protocol, the Subcommittee believes that publication of its visit reports reflects the spirit of transparency on which preventive visiting is based, and it encourages report recipients to authorize their publication.

17. In conformity with established practice, recipients are requested to reply to visit reports within six months of their transmission, giving a full account of action taken to implement the recommendations they contain. During the reporting period the Subcommittee received a reply from Gabon to its report. The Subcommittee considers the replies from the following States parties to be overdue: Cambodia, Honduras, Kyrgyzstan, Liberia, Mali, Malta, Nigeria, Peru, Republic of Moldova and Senegal. It considers the replies from the national preventive mechanisms of the following States parties to be overdue: Armenia, Republic of Moldova and Senegal.

18. At its twenty-fifth session, the Subcommittee decided to streamline its follow-up procedure by ceasing to submit written responses to replies received. In order to facilitate a more effective and interactive follow-up procedure, it was decided that at the end of each visit, the State party would be invited to discuss and agree upon the most effective means of engaging in dialogue with the Subcommittee. In addition, at the session following each visit, a meeting would be held, either in person, through electronic conferencing or with the Permanent Mission, as appropriate, in order to initiate a more focused post-visit dialogue process.

E. Developments concerning national preventive mechanisms

19. Of the 80 States parties to the Optional Protocol, 54 have officially notified the Subcommittee of the designation of their national preventive mechanisms, information concerning which is listed on the Subcommittee website.

20. In 2015, the Subcommittee received three official notifications of designation, from Kazakhstan, Kyrgyzstan and Romania.

21. As at the end of 2015, the one-year deadline for the designation of a national preventive mechanism provided for under article 17 of the Optional Protocol had not expired for four States parties: Belize, Mongolia, Rwanda and South Sudan.

22. As at 31 December 2015, 19 States parties had not complied with their obligations under article 17 of the Optional Protocol. That is the same number as at the end of 2014. It is a matter of great concern to the Subcommittee, particularly since some States parties appear to be making little progress in fulfilling their obligations. At each Subcommittee session, the regional teams review progress towards the fulfilment of each State party's obligation, making appropriate recommendations to the plenary on how the Subcommittee can best advise and assist the States parties concerned, in accordance with its mandate under article 11 (b) (i) of the Optional Protocol. At its twenty-seventh session, the Subcommittee decided to ask its regional teams to identify those States parties that appeared to be making little real progress and report back to the plenary at the twenty-eighth session, with a view to the Subcommittee making its concerns public.

23. The Subcommittee has continued to engage in dialogue with States parties at its sessions concerning the designation or functioning of their national preventive mechanisms. At its twenty-fifth, twenty-sixth and twenty-seventh sessions, it held meetings with the

Permanent Missions of Bulgaria, Ecuador, Guatemala, Honduras, Peru, Poland, the former Yugoslav Republic of Macedonia and Ukraine. It held preparatory meetings with all the States parties it planned to visit and, in accordance with its new practice, also invited States parties that it had visited since its previous session to meet with it. The Subcommittee also met a delegation from the European Union to discuss the treatment of asylum seekers. At the twenty-sixth session, the Subcommittee held a meeting with States parties to the Optional Protocol, 22 of which attended: Azerbaijan, Burkina Faso, Croatia, Denmark, Ecuador, Finland, Germany, Greece, Guatemala, Italy, Luxembourg, Maldives, Mauritius, Nicaragua, Norway, Republic of Moldova, Romania, Spain, Switzerland, Togo, Ukraine and United Kingdom of Great Britain and Northern Ireland. States parties were updated on the recent activities of the Subcommittee, discussed the treaty body strengthening process and considered the future direction of the Subcommittee's work.

24. The Subcommittee established and maintained contact with national preventive mechanisms themselves, in accordance with its mandate under article 11 (b) (ii) of the Optional Protocol. The Subcommittee held videoconferences with the national preventive mechanisms of Ecuador, Malta and Ukraine and met with the national preventive mechanism of France. It also met with representatives of the Australian Human Rights Commission.

25. The Subcommittee and its members have continued to receive invitations to attend numerous national, regional and international meetings on the designation, establishment and development of national preventive mechanisms in particular and on the Optional Protocol in general. Information concerning those events is available on the Subcommittee website. The Subcommittee is grateful to the organizers of those and all other events to which it has been invited. It regrets that its participation must remain conditional on the financial support of others, as it has no means of its own with which to fund its members' attendance.

26. During the course of 2015, the Subcommittee assisted national preventive mechanisms by responding to a number of requests for interpretive assistance on the provisions of the Optional Protocol and the application of a preventive approach to specific situations. As such advice is of general interest, a compilation of the advice provided is contained in the annex to the present report and is available on the Subcommittee website.

F. Special Fund established by the Optional Protocol

27. The purpose of the Special Fund established under article 26 (1) of the Optional Protocol is to help finance the implementation of Subcommittee recommendations made following a visit to a State party, and the establishment and/or effective functioning of national preventive mechanisms.[3] The Subcommittee is deeply concerned that in 2015 only one contribution, of $30,000, was made. Contributions are urgently needed in order to sustain and consolidate the Special Fund and its work.

28. The Subcommittee believes that the collaborative manner in which the Special Fund is currently administered reflects the aspirations of the drafters of the Optional Protocol. In particular, the Subcommittee believes that the focused and country-specific guidance that it can provide concerning its recommendations is essential in order to maximize the preventive impact of the grants made. The Subcommittee hopes that the Fund will continue to support projects that are essential for the effective prevention of torture and ill-treatment,

[3] The Special Fund receives voluntary contributions from Governments, intergovernmental and non-governmental organizations and other private and public entities.

and calls upon States to continue to support the Fund financially. The Subcommittee has established a working group to review with the secretariat of the Fund how the work and visibility of the Fund could be maintained and enhanced. The working group will also study the Fund's administrative arrangements and explore the options for and possibility of establishing an advisory mechanism to oversee its operation.

III. Engagement with other bodies in the field of torture prevention

A. International cooperation

1. Cooperation with other United Nations bodies

29. The Chair of the Subcommittee presented the eighth annual report of the Subcommittee (CAT/C/54/2) at the plenary meeting of Committee against Torture on 28 April 2015. The Subcommittee and Committee met jointly in Geneva on 18 November 2015 to discuss issues pertaining to the prevention of torture and ill-treatment of lesbian, gay, bisexual, transgender and intersex persons. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) and the Association for the Prevention of Torture (APT) facilitated and participated in the meeting.

30. In conformity with General Assembly resolution 68/156, and together with the Chair of the Committee against Torture and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, who presented their respective reports, the Subcommittee Chair presented the eighth annual report of the Subcommittee to the General Assembly at its seventieth session, on 20 October 2015.[4]

31. The Subcommittee continued its involvement in the annual meetings of the Chairs of the human rights treaty bodies. At their twenty-seventh meeting, held in San José in June 2015, the Chairs endorsed the Guidelines against Intimidation or Reprisals (San José Guidelines), which the Subcommittee then endorsed at its twenty-seventh session. The Subcommittee reviewed and revised its own policy on reprisals (CAT/OP/6) in the light of the San José Guidelines and adopted revised Subcommittee guidelines at its twenty-eighth session. The Subcommittee also discussed the implementation of General Assembly resolution 68/268. It continued to monitor its activities to ensure conformity with the guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines). It also participated in numerous other activities of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

32. The Subcommittee joined the Special Rapporteur on torture, the Committee against Torture and the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture in issuing a statement on the occasion of the International Day in Support of Victims of Torture (26 June). The Subcommittee continued to cooperate systematically with other mechanisms, including by transmitting to the Committee against Torture its recommendations concerning States parties to the Optional Protocol the reports of which are to be considered at forthcoming sessions of the Committee.

33. The Subcommittee continued its cooperation with the Office of the United Nations High Commissioner for Refugees, including at a meeting during the Subcommittee's

[4] The Chair's statement to the General Assembly is available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16717&LangID=E.

twenty-seventh session; the World Health Organization; and the United Nations Office on Drugs and Crime.

2. Cooperation with other relevant international organizations

34. The Subcommittee continued its cooperation with the International Committee of the Red Cross, particularly in the context of its field visits and its twenty-sixth session.

B. Regional cooperation

35. Through the heads of its regional teams, the Subcommittee continued to cooperate with regional partners, including the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, the Council of Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Commission.

C. Civil society

36. The Subcommittee continued to benefit from the support of civil society, particularly APT and several academic institutions. It has also benefited from its contact with civil society organizations during visits and thanks them all for their work to promote the Optional Protocol and support it. The Subcommittee particularly thanks ILGA and APT for facilitating the joint meeting with the Committee against Torture on prevention of torture of lesbian, gay, bisexual, transgender and intersex persons. Special thanks go to APT for its invaluable support to the Optional Protocol and the Subcommittee.

IV. Issues of note arising from the work of the Subcommittee during the period under review

A. Changes in membership

37. The Subcommittee welcomed 13 newly elected members and congratulates both its new and returning members on their election, noting that they bring with them experience and expertise in diverse fields relevant to the Subcommittee's work. The Subcommittee expresses gratitude to its departing members, including those who were not eligible for re-election owing to the expiry of their second term of office. The original membership of those first elected to the Subcommittee has therefore now elapsed and the membership has been reconstituted in accordance with the principles of rotation provided for in the Optional Protocol. While the Subcommittee benefits greatly from the fresh perspectives of its new members, it is also aware of the significant loss of experience that the rotation entails, and notes the implications for dialogue based on visits being sustained over time. The experience of its former members helped inform the revised approach to the post-visit dialogue, which is aimed at swifter and more intensive dialogue within a more rapid time frame in order to capitalize on the experience of members participating in country visits.

38. The Subcommittee notes with satisfaction that new members were, for the first time, provided with a one-day induction programme prior to the commencement of their term. Nonetheless, the Subcommittee regrets that it lacked the capacity to carry out the induction as effectively as it would have wished, particularly owing to the lack of interpretation facilities, and believes that further thought should be given to how best to provide appropriate training for the distinctive field-based work of the Subcommittee.

B. Development of working practices

1. Visits

39. While visits are one of the fundamental functions of the Subcommittee, to date it has been possible to undertake only a limited number of visits each year owing to the financial and human resource constraints within OHCHR. Nevertheless, in 2015, the Subcommittee expanded its programme of visits, completing eight visits focusing on various aspects, including the visit to Netherlands that had originally been planned for 2014 and the resumed visit to Azerbaijan following the suspension of the 2014 visit.

40. The Subcommittee had in previous years found innovative ways to engage with both national preventive mechanisms and States parties, crafting different types of visit in an attempt to enable it to fulfil its mandate under article 11 (1) (b) of the Optional Protocol. While it has been useful for the Subcommittee to focus on particular issues in different types of visit, such categorization has at times proved limiting and has hindered the Subcommittee in the full and robust exercise of its mandate. The Subcommittee therefore decided to cease categorizing its visits and to formulate, from 2016, a plan best suited to the exigencies of each visit.

2. Working groups

41. The working group on medical issues presented its report on the approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent (CAT/OP/27/2), which was adopted by the Subcommittee at its twenty-seventh session as a public document, and the prison health-care assessment checklist. The working group also commenced and pursued its work on a health-care resource tool, which will be a compilation of the recommendations on health care made in Subcommittee visit reports.

42. The working group on procedural issues adopted working papers on the definition of the term "place of deprivation of liberty" in relation to the scope of article 4 of the Optional Protocol; body searches conducted by national preventive mechanism staff in the context of monitoring visits; and the application of the principle of confidentiality in the work of national preventive mechanisms. The Subcommittee hopes to have the working papers translated into its working languages and for them to be available on its website. The papers were produced in response to requests for guidance from national preventive mechanisms. The Subcommittee encourages such requests and hopes that the public presentation of a compilation of such position papers will be of general interest. The working group also commenced work on revising the Subcommittee's policy on reprisals in the light of the San José Guidelines.

43. The working group on jurisprudence and thematic issues concluded its work on developing the Subcommittee's position on the prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons (see sect. V below) and on its paper on the prevention of torture and ill-treatment of women deprived of their liberty (CAT/OP/27/1), which was adopted by the Subcommittee at its twenty-seventh session.

44. The ad hoc intersessional working group on the self-assessment tool for national preventive mechanisms was discontinued following the completion of its work. An updated version of the tool was adopted by the Subcommittee (CAT/OP/1/Rev.1) and is available on the Subcommittee website.

45. An ad hoc working group on the Special Fund established by the Optional Protocol was set up, composed of Enrique Andrés Font, Lowell Goddard, Lorena González Pinto,

Suzanne Jabbour, June Lopez, Víctor Madrigal-Borloz and Catherine Paulet. It will liaise with the secretariat of the Special Fund to explore how to improve the functioning of the Fund.

3. Regional teams

46. Regional teams and country rapporteurs have continued to be in frequent dialogue and communication with national preventive mechanisms, facilitating the exchange of information and advice. Owing to the different sizes of, and levels of engagement in, the various regional teams, they have adopted the working methodologies that best suit their needs, which have included increased use of videoconferencing to ensure better outreach and efficacy.

4. Development of Subcommittee position papers

47. The working group on jurisprudence and thematic issues is currently drawing up position papers on prevention of torture in the transfer or relocation of persons deprived of their liberty; prevention of torture of migrants and refugees; and independence of national preventive mechanisms, with a focus on those within ombudsman's offices and national human rights institutions. As in previous years, the Subcommittee welcomes comments and contributions for their development.

V. Substantive issues: prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons

A. Introduction

48. Individuals often experience multiple and extreme forms of discrimination in the form of torture and other cruel, inhuman or degrading treatment or punishment in relation to their sexual orientation or gender identity. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted that members of sexual minorities are disproportionately subjected to such treatment because they fail to conform to socially constructed gender expectations (see A/56/156, para. 19), an observation with which the Subcommittee concurs. The related stigma can contribute to the dehumanization of the victim, which is a facilitating factor for torture and ill-treatment (ibid.).

49. In its resolution 27/32, the Human Rights Council expressed grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity. There is abundant evidence to conclude that torture and ill-treatment of lesbian, gay, bisexual, transgender and intersex persons are endemic concerns, as has been attested to by the United Nations High Commissioner for Human Rights (see A/HRC/19/41), and that such treatment takes place in police stations, prisons, hospitals and other health-care settings, military, juvenile and migration detention facilities and other places of detention, as defined in article 4 of the Optional Protocol.

50. It is the duty of the State to design and implement legislative, administrative and judicial measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. Effective compliance depends partly on an adequate understanding of the causes, nature and consequences of concerns particular to specific groups, communities and populations. In the case of lesbian, gay, bisexual, transgender and intersex persons, in order to accomplish their duty of prevention, State parties and other entities have utilized

international law, as clarified by the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

B. Lesbian, gay, bisexual, transgender and intersex persons, sexual orientation and gender identity

51. The human rights problems faced by lesbian, gay, bisexual, transgender and intersex persons encompass, in varying forms, preconceptions, stereotypes and prejudice in relation to sex, sexual orientation, gender, gender identity and gender expression.

52. Various bodies and organizations have interpreted the term "sex" as referring to biological differences between men and women,[5] physiological characteristics,[6] the sum of biological characteristics that define the spectrum of humans as females and males,[7] and a biological construct, referring to the genetic, hormonal, anatomical and physiological characteristics on the basis of which a person is labelled at birth as either male or female.[8]

53. Gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for those biological differences.[9] In that context, gender identity can be understood as each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, such as dress, speech and mannerisms.[10] Gender identity includes the category of transgenderism or trans, the common denominator of which is that the person's biological sex and gender identity do not correspond to what is traditionally understood as a match. Subcategories that do not necessarily imply body alterations refer to persons who express their gender identity, either on a permanent or temporary basis, by wearing articles of clothing and adopting the deportment and mannerisms of the gender opposite to the one socially and culturally associated with their biological sex.

54. A person's sexual orientation is independent from biological sex, and is defined as the capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[11]

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[5] See Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 5.

[6] See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 20.

[7] Pan American Health Organization (PAHO), *The Right of Young People to Health and Gender Identities: Findings, Trends and Targets for Public Health Action* (Washington, D.C., PAHO, 2011), p. 7.

[8] Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (Washington, D.C., National Academies Press, 2011), p. 25.

[9] See note 5 above.

[10] See the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, preamble.

[11] Ibid., 6.

55. Intersex persons are born with physical or biological sex characteristics, including sexual anatomy, reproductive organs and/or chromosomal patterns, that do not fit the typical definitions of male or female.[12]

C. Torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons

56. Discrimination can manifest itself directly or indirectly; intentionally or unintentionally; de facto, when it manifests itself in practice; or de jure, when its source can be traced to the law or a legal norm.

57. De jure discrimination is particularly relevant in relation to lesbian, gay, bisexual, transgender and intersex persons, as much ill-treatment directed against them derives from the existence of legal norms: 76 countries retain laws that criminalize types of sexual orientation or gender identity, typically prohibiting certain sexual acts between adults of the same sex, or certain gender expressions. In some cases, the wording of the law refers to vague and undefined concepts, such as "crimes against the order of nature", "morality" or "debauchery". Penalties include life imprisonment in some countries, and the death penalty in eight countries.

58. Criminalization relating to sexual orientation and gender identity promotes torture and ill-treatment: where same-sex conduct is illegal, sexual orientation may be treated as a problem that needs to be corrected, ignored or used to legitimize violence directed at individuals who engage in such conduct (see A/HRC/14/20, para. 23). Such laws contribute to a social environment that condones abuse, as lesbian, gay, bisexual, transgender and intersex persons are already thought to be engaging in illegal activity. Thus, it is logical to infer that police are less likely to investigate crimes against them.[13] The consequences of such perceptions also hinder related State efforts to protect the integrity or life of lesbian, gay, bisexual, transgender and intersex persons. For example, in one country where same-sex relations are criminalized, the Subcommittee was informed that the distribution of condoms in male prisons would be seen as promoting crime and was therefore prohibited, exposing inmates to a higher risk of HIV infection.

59. Another major concern is the lack of statistics on ill-treatment and torture on the basis of sexual orientation and gender identity, resulting from the absence of appropriate methods of self-identification, data collection and processing. As noted by OHCHR, official statistics tend to understate the number of incidents, and prejudicial and inexact categorization of cases results in misidentification, concealment and underreporting (see A/HRC/29/23, para. 25). The systemic failure in data collection often results in the virtual invisibility of the concerns and problems of lesbian, gay, bisexual, transgender and intersex persons. The rates of sexually transmitted infections among transgender persons are 40 times higher than those among the general population, but that alarming difference can be rendered invisible unless data is broken down by gender identity.[14]

60. Violence against lesbian, gay, bisexual, transgender and intersex persons is exacerbated in situations of deprivation of liberty. Such persons often experience serious discrimination, even before arrest, as arbitrary detention may occur as the result of

[12] See the factsheet on intersex, available at www.unfe.org/en/fact-sheets.

[13] See Inter-American Commission on Human Rights, "Report on the situation of human rights in Jamaica" (2012), para. 271. Available at www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf.

[14] PAHO, "Blueprint for the provision of comprehensive care to transgender and transsexual persons and their communities in Latin America and the Caribbean (LAC)", p. 7.

homophobic or transphobic bias.[15] About 7 per cent of the transgender persons participating in one study reported that they had been arrested or held in a cell owing to the bias of police officers,[16] a prejudice often reinforced by difficulties deriving from the lack of identification papers or documents that correspond to their apparent gender. A number of reports refer to the use of degrading language, contact and treatment during arrest. With very few exceptions, State officers are not trained to understand the needs of lesbian, gay, bisexual, transgender and intersex persons and there are no institutional policies and methods to adequately address self-identification, classification, risk assessment and placement. That results in violence against such persons and a lack of access to necessary resources and services, such as physical and mental care.

61. Both the Special Rapporteur on torture and the Subcommittee have noted that in detention facilities there is usually a strict hierarchy, and that those at the bottom of the hierarchy, including lesbian, gay, bisexual and transgender persons, typically suffer double or triple discrimination.[17] Complaints of insults, beatings, confinement and targeted forms of violence are not uncommon.[18] Ill-treatment extends to discrimination based on perceptions or preconceptions, for example, when men suspected of homosexual conduct are subjected to non-consensual anal examinations to "prove" or "disprove" their homosexuality.[19]

62. Abuse may be perpetrated by fellow inmates or by the staff of the place of detention. Some studies have recorded that non-heterosexual inmates are 10 times more likely than heterosexual inmates to be sexually assaulted by other inmates, and 3 times more likely to be sexually assaulted by prison staff.[20] In the case of transgender persons, the likelihood of being sexually assaulted by a fellow inmate was 13 times higher than for cisgender persons.[21]

63. Research on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations and of transgender individuals. The basic statistics revealed in such research have been confirmed by the experience of members of the Subcommittee; for example, one gay inmate reported to the Subcommittee that he had been raped on multiple occasions and made to walk around wearing short skirts (see CAT/OP/PRY/1, para. 214), and lesbians have reported having been subjected to so-called "corrective rape".

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[15] See, for example, Working Group on Arbitrary Detention, opinion No. 22/2006 (Cameroon).

[16] Jaime M. Grant and others, *Injustice at Every Turn: A Report of the Transgender Discrimination Survey* (Washington, National Gay and Lesbian Task Force and National Center for Transgender Equality, 2011), p. 163.

[17] See A/HRC/13/39/Add.5, para. 231 and A/56/156, para. 19. The Special Rapporteur has also observed the lack of relevant statistics, owing to which the problems faced by lesbian, gay, bisexual and transgender persons are virtually invisible to policymakers.

[18] See, for example, Council of Europe, "Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 1 to 10 April 2014" (Strasbourg, 2015), para. 46, and "Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 10 to 21 May 2010" (Strasbourg, 2011), para. 66.

[19] Such examinations, which are medically worthless, have also been condemned by the Committee against Torture and the Special Rapporteur on torture (see A/HRC/19/41, para. 37).

[20] United States Department of Justice, Bureau of Justice Statistics, "Sexual victimization in prisons and jails reported by inmates, 2011-12: national inmate survey, 2011-12", pp. 18 and 30. Available at www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

[21] University of California, Irvine, Center for Evidence-Based Corrections, "Violence in California correctional facilities: an empirical examination of sexual assault" (2007), p. 42.

64. Even measures that appear to be protective can often operate to the detriment of individuals. Authorities routinely rely on prolonged periods of protective custody, isolation or solitary confinement as default forms of protection,[22] but those measures are extremely taxing on the person and restrict access to education, work and programme opportunities that affect time off for good behaviour and parole. As a result, lesbian, gay, bisexual and transgender persons are not only likely to serve their sentences in isolation, but also more likely to serve longer time.

65. The Subcommittee has noted with particular concern the situation of complete abandonment of transgender women and men in detention. At the outset, the absence of adequate policies and methods of identification, registration and detention has severe consequences: obtaining precise individual information as to gender identity is vital to determining proper treatment, including hormone and other treatment associated with gender transition. In the absence of mechanisms to obtain such information, grave health consequences ensue.

66. The lack of institutional policies and methods to adequately address self-identification, classification, risk assessment and placement leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel. During its visits, the Subcommittee has learned that transgender persons deprived of their liberty are often beaten and forced to enact sex scenes in front of fellow inmates, practices that are often sponsored by guards who charge for viewings. They are also required to shower in the presence of persons of the opposite gender, are patted down by officers of the opposite gender, and are sometimes groped with the sole purpose of determining the nature of their genitalia. The Subcommittee has learned of deaths of transgender women in custody, including an occurrence of death after anal penetration with a club (see CAT/OP/PRY/1, para. 214).

67. Those concerns are also present when deprivation of liberty occurs in other contexts. For instance, lesbian, gay, bisexual, transgender and intersex migrants often suffer serious mental health effects of ill-treatment in their country of origin. As mental health treatment is virtually non-existent in migration facilities, symptoms are often aggravated and retraumatization often occurs. Those concerns extend to ill-treatment (see A/HRC/19/61/Add.4, para. 172) and violation of the principle of non-refoulement.

68. In health-care settings, ill-treatment and torture include denial of gender-appropriate medical treatment, verbal abuse and public humiliation, psychiatric evaluations, sterilization, and hormone therapy and genital-normalizing surgeries under the guise of so-called "reparative therapies". Identifying ill-treatment and discrimination in health-care settings is particularly important since homosexuality is still treated as a pathology by some medical professionals, despite the World Health Organization having removed it from the International Classification of Diseases (ICD-10) in 1992. To date, transgender and intersex persons continue to be pathologized in medical settings based on medical classifications.

69. The Committee on the Elimination of Discrimination against Women and the Special Rapporteur on torture have expressed concern about lesbian, bisexual, transgender and intersex women as victims of abuse and mistreatment by health-service providers (see A/HRC/19/41, para. 56). That includes so-called "normalization therapies", in pursuit of which members of sexual minorities are said to have been involuntarily confined to medical institutions and allegedly subjected to forced treatment, including electric shock therapy

[22] See, for example, European Court of Human Rights, *Case of X v. Turkey*, application No. 24626/09, final judgement adopted on 25 May 2013, para. 53.

and other "aversion therapy", reportedly causing psychological and physical harm (see A/56/156, para. 24). As noted by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, attempts to "cure" those who engage in same-sex conduct are not only inappropriate, but have the potential to cause significant psychological distress and increase stigmatization of those vulnerable groups (see A/HRC/14/20, para. 23).

70. Many intersex children, born with atypical sex characteristics, are subjected to discrimination and medically unnecessary surgery, performed in health-care settings without their informed consent or that of their parents (see A/HRC/19/41, para. 57) in an attempt to force their physical appearance to align with binary sex stereotypes. Such procedures are typically irreversible and can cause severe, long-term physical and psychological suffering and may amount to torture or ill-treatment, as well as a harmful practice. Many entities have called for an end to the practice, including the Committee on the Rights of the Child, the Committee against Torture, the Special Rapporteurs on the right to health and on torture and the United Nations High Commissioner for Human Rights (see A/HRC/29/23, para. 53).

D. Duty of prevention

71. The Subcommittee stresses that it is fundamental that lesbian, gay, bisexual, transgender and intersex persons are included in the design, implementation and evaluation of measures adopted to prevent torture and ill-treatment against them. That would ensure an understanding of the diversity of the individuals, groups, communities and populations concerned. The Subcommittee considers that the maxim "nothing about us without us" must be seen as a guiding principle in that regard.

72. Strengthening the protection of people deprived of their liberty requires the adoption of legislative, administrative and judicial measures. To be adequate, such measures require diligent risk assessment, including the identification of causes, forms and consequences of violence and discrimination. It is essential to question preconceptions, stereotypes and prejudice regarding conduct, physical appearance and perceived gender. It is also essential to ensure that context is assessed, taking into account the ethical principle of "do no harm", since isolated, decontextualized or intuitive actions may increase the risk of violence against lesbian, gay, bisexual, transgender and intersex persons.

73. The reform of laws criminalizing consensual same-sex conduct is essential. Such laws, by their mere existence, violate the rights to privacy and non-discrimination (see A/HRC/29/23, para. 43). Moreover, they exacerbate the risk of other violations and impede the elimination of impunity in relation to torture and ill-treatment.

74. Authorities must adopt the measures necessary to ensure that violence based on sexual orientation and gender identity is properly identified, carry out prompt and impartial investigations into allegations of torture and ill-treatment, including sexual violence, in accordance with articles 12 and 13 of the Convention against Torture, and provide reparations to victims. In cases where those allegations involve prison staff, the staff members should be suspended from duty for the duration of the trial, and dismissed from service if they are found guilty (see CAT/OP/PRY/1, para. 216). States must prevent the further marginalization of persons when placing them in detention, and avoid subjecting them to the risk of violence, ill-treatment or torture.

75. Within the sphere of their competence, all State agencies, including national preventive mechanisms should collect and publish data on the number and types of incidents of torture and ill-treatment against lesbian, gay, bisexual, transgender and intersex

persons, and the result of the respective investigations, as well develop appropriate models of data collection, processing and analysis.

76. In cases of lesbian, gay, bisexual, transgender and intersex persons deprived of liberty in any place of detention, State authorities must recognize specific risks, identify those who are in a vulnerable situation, and protect them in ways that do not leave them isolated. Special attention should be paid to ascertaining the reasons for arrest, and specific policies must be developed in relation to searches, intake and interrogation. To that end, some correctional agencies use written instruments to screen all incoming prisoners for risk of sexual assault as a means of supporting evidence-based policies and procedures on housing and programming. States must put in place measures to prevent discriminatory disciplinary measures. In particular, decisions on the housing of transgender persons should be done on a case-by-case basis, considering seriously their views as to their safety and, to the extent possible, with their informed consent. The specificity of the needs of transgender persons makes the involvement of transgender activists and experts particularly desirable.

77. As with other groups, communities and populations in situation of vulnerability, it is imperative that States put measures in place to identify and properly address the specific health needs of lesbian, gay, bisexual, transgender and intersex persons. That includes the highly specific needs of transgender persons, including hormone and other treatment associated with gender transition.

78. Solitary confinement, isolation and administrative segregation are not appropriate methods of managing the security of persons, including lesbian, gay, bisexual, transgender and intersex persons, and can be justified only if used as a last resort, under exceptional circumstances, for the shortest possible time and with adequate procedural safeguards.

79. The Subcommittee has made recommendations to States parties on providing training and awareness-raising on international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity. Those measures should be aimed at prison staff, law enforcement personnel, prosecutors, judges and other relevant State officers, and should include training on how to communicate effectively and professionally with lesbian, gay, bisexual, transgender and intersex detainees and how to identify and respond to their legitimate needs.

80. In placing lesbian, gay, bisexual, transgender and intersex migrants, refugees and asylum seekers in any form of detention, authorities must avoid exposing them to a risk of ill-treatment and torture, and take into account their medical needs. If the security of the person cannot be guaranteed in detention, alternatives must be considered. States must have mechanisms in place to consider the manner in which certain existing benefits, such as extended visits, will need to be tailored so that they include lesbian, gay, bisexual, transgender and intersex persons.

81. States must ban so-called "conversion therapy", involuntary treatment, forced sterilization and forced genital and anal examinations; they should also ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, approach sexual orientation and gender identity as medical conditions to be treated, cured or suppressed. In particular, the prevention of harmful medical practices must extend to protection for intersex children, and medically unnecessary procedures must be banned.

82. That work should be accompanied by extensive public awareness campaigns on the prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons, and information campaigns on how and where to bring claims before competent authorities.

VI. Looking forward

83. During 2015, the Subcommittee continued to modify and review its working methods and practices as it endeavoured to fulfil its mandate better and increase outreach efficiently. The changes made to date have been promising, having not only increased the Subcommittee's capacity to engage with States parties, national preventive mechanisms and other stakeholders but having also facilitated the enhancement of the Subcommittee's responsiveness, adding vigour to its efforts.

84. The plan for Subcommittee visits that has been adopted is quite ambitious. It is nonetheless necessary in order to respond to the increasing number of States parties to the Optional Protocol, and to ensure that the wealth of the Subcommittee members' expertise is effectively utilized thorough engagement in field activities.

85. The work of the Subcommittee increases substantially every year with the establishment of each new national preventive mechanism and the conduct of each new visit. Each time, such events initiate a separate and parallel series of engagements and dialogues which add to, and stand alongside, those already under way. Thus the Subcommittee's work grows exponentially each year, but the level of core funded support for the Subcommittee does not increase in line with its workload. The results of the treaty body strengthening process have been disappointing for the Subcommittee. In particular, the Subcommittee had hoped that the request in General Assembly resolution 68/268 for OHCHR to provide advisory services, technical assistance and capacity-building for States parties would allow the Subcommittee to provide States parties with advice and technical assistance on the establishment of national preventive mechanisms, as it is mandated to do under article 11 of the Optional Protocol, and with advice on technical aspects of implementing its recommendations in the context of post-visit dialogue.[23] The Subcommittee regrets that this has not been the case. As a result, it has been compelled to spend more time in its plenary sessions on such matters, seeking to address that lack of support for in-country activities with videoconferencing when possible. Given that more session time has had to be devoted to such activities, it is necessary for the Subcommittee to seek an increase in its meeting time to accommodate the additional work. While it would rather focus on additional in-country engagement, in the light of the apparent lack of support for such activities, the Subcommittee has decided that it is necessary to seek additional meeting time. The Subcommittee is committed to doing everything necessary to ensure that its work is as effective as possible and will continue to seek to surmount the difficulties it faces. The Subcommittee remains grateful to its secretariat staff for their unstinting assistance and support.

A. Future plan of work

86. Despite those challenges, the Subcommittee has adjusted its working methods to accommodate its most ambitious programme of visits to date. Since adopting its previous annual report, it has decided to visit the following countries: Chile, Cyprus, Kazakhstan, Mauritania, Mexico, Mozambique, Niger, Romania, Tunisia and Ukraine, in addition to the visit to Benin, postponed from 2015. The Subcommittee retains flexibility to revisit its programme should it prove necessary for operational or other reasons.

[23] See also General Assembly resolution 68/268, para. 26 (d), which refers to the adequate allocation of financial and human resources to those treaty bodies whose main mandated role is to carry out field visits.

87. In identifying which countries to visit, the Subcommittee continues to exercise a reasoned process, considering factors including the optimal use of the information received from regional teams, the most efficient use of the financial and human resources available and ensuring appropriate engagement with all States parties over time. In addition, the Subcommittee pays careful attention to the date of ratification of the Optional Protocol, the development of national preventive mechanisms, geographic distribution, the size and complexity of the State, preventive monitoring at the regional level and any specific or urgent issues that might be relevant to its decision-making.

B. Annual reports

88. In recent years, the Subcommittee has used its annual report as a means of reflecting on its work and putting into the public domain its thoughts on various issues of substance. Changes to the rules concerning the publication of documentation mean that the annual report is becoming less useful as a vehicle for bringing matters of importance to public attention and is more useful as a repository of factual material. The Subcommittee will therefore reconsider the format and content of its future annual reports. It is likely that the present report will be the last one to reflect the current approach.

Annex

Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms

I. Scope of article 4 of the Optional Protocol

1. Article 4 contains two paragraphs that must be read together and that place within the scope of the Optional Protocol any public or private custodial setting under the jurisdiction and control of the State party, in which persons may be deprived of their liberty and are not permitted to leave, either by an order given by any judicial, administrative or other authority or at its instigation or with its consent or acquiescence.

2. The preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism.

3. The Subcommittee therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function. In all situations, the national preventive mechanism should also be mindful of the principle of proportionality when determining its priorities and the focus of its work.

II. Application of the principle of confidentiality in the work of national preventive mechanisms

4. The Subcommittee has been asked by national preventive mechanisms to clarify the application of the principle of confidentiality in the context of obligations that might be imposed on them to disclose information they obtain in the course of their work.

5. The principle of confidentiality in relation to the work of national preventive mechanisms is outlined in article 21 (2) of the Optional Protocol, which indicates that confidential information collected by national preventive mechanisms shall be privileged, and that no personal data shall be published without the express consent of the person concerned. The Subcommittee believes that the obligation of confidentiality under the Optional Protocol should be given the widest possible interpretation in order to reflect the spirit of the Convention.

6. The role of the national preventive mechanism is to assist in the prevention of torture. It is not an investigative body, and even when the institution performing the functions of the national preventive mechanism, or that is designated as such, has investigative functions or has an obligation to report, when operating as an national preventive mechanism under the Optional Protocol, the preventive nature of its work means that confidentiality should not be breached.

7. Under the Optional Protocol, personal data protection extends to a wide range of persons including, but not limited to, persons deprived of their liberty, their families, lawyers, members of non-governmental organizations and State officials. Personal data shall remain confidential unless the persons concerned have given their express consent for the data to be disclosed.

8. Should a national preventive mechanism become aware of allegedly criminal activity, whether of torture, related crimes or other categories of crime, such activity may be reported, but unless there is express consent, personal data related to it shall be protected. That is to say, the obligation of confidentiality should not be construed as preventing national preventive mechanisms from disseminating information, provided that the information does not include personal data, unless express consent is given by the person concerned. Thus, for example, where information relating to systematic issues or crimes is gathered, its existence can be reported in general terms. However, particular care must be taken to assess whether the sharing of information relating to a particular situation or particular crime might inevitably lead to the disclosure of personal data or to the identification of a person who has not given their express consent for their personal data to be revealed. In such cases the obligation of confidentiality prevails.

9. It is the view of the Subcommittee that publishing personal data equates to the sharing of such information with a third party.

10. Wherever legislation requires the national preventive mechanism or its officials to report crimes and/or share information, the principle of confidentiality as provided for in Optional Protocol, and as explained above, shall prevail.

III. Organizational issues regarding national preventive mechanisms that form part of a national human rights institution

Financial autonomy of the national preventive mechanism with respect to the budget of the national human rights institution

11. Article 18 (1) of the Optional Protocol is unequivocal on the need for the State party to allocate specific resources to national preventive mechanism work, so as to guarantee the operational independence of the mechanism (see CAT/OP/12/5, para. 8). The Subcommittee guidelines on national preventive mechanisms indicate explicitly that the mechanism should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol (ibid., para. 12).

12. This implies that national preventive mechanisms must be capable of acting independently, not only from the State but also from the national human rights institution. For that purpose, the State party should ensure a specific allocation of funds to the national preventive mechanism.

13. A request for the national preventive mechanism budget should be drafted by the mechanism itself, on the basis of the mechanism workplan, and submitted to the State authorities and/or legislative power separately from that of the national human rights institution. In case of a public hearing or audience in the National Assembly/Congress, the Subcommittee is of the view that the head of the national preventive mechanism should present the draft budget and respond to any related questions. Once the budget is approved, decision-making regarding the use of specific mechanism resources remains the prerogative of the mechanism itself.

14. Needless to say, coordination between the national human rights institution and the national preventive mechanism could be very beneficial and joint advocacy and awareness-raising campaigns could be envisaged in order to collect funds and explain the nature of each entity's work, particularly the fact that the mandates of the two entities are complimentary.

Hierarchical status of the head of the national preventive mechanisms in relation to the ombudsperson/head of the national human rights institution

15. This is a common challenge for many national human rights institutions that assume the national preventive mechanism mandate. According to the Optional Protocol, there should be plurality and a multidisciplinary approach in the national preventive mechanism work. When power is vested in one individual, such as an Ombudsperson, the above-mentioned requirements are by definition impossible. In order to guarantee the operational autonomy of the national preventive mechanism and a "flat" relationship between the national human rights institution and the national preventive mechanism, the Subcommittee would recommend placing the mechanism as a parallel structure at the level of the head of the institution and abstaining from situations in which the mechanism is placed under several departments, which diminishes its visibility.

16. Moreover, the Subcommittee has encountered situations in which placement of a national preventive mechanism as a section under, for instance, a legal department, has jeopardized the independence of the mechanism's decision-making process (see the report of the Subcommittee advisory visit to the national preventive mechanism of Ecuador (CAT/OP/ECU/2)). Ultimately, the organizational chart should reflect the requirements of the Optional Protocol, which specify that the national preventive mechanism should have operational autonomy with regard to its resources, workplan, findings, recommendations and direct, and, if needed, confidential contact with the Subcommittee.

Templates of legislation where national human rights institutions were designated as national preventive mechanisms

17. The Subcommittee is of the view that there is no "one size fits all" legislation for States parties in which national human rights institutions are designated as national preventive mechanisms, as the legislation should take into account the idiosyncrasies of national realities. However, public Subcommittee reports could be used and contact with similar institutions could be sought for the purpose of comparison.

Relationship between traditional functions of a national human rights institution and the preventive function of a national preventive mechanism

18. The Optional Protocol and Subcommittee guidelines foresee two different and separate structures serving two different mandates and preserving a level of autonomy.

19. While the national preventive mechanism is charged with the core national preventive mechanism functions, this does not preclude other departments or staff of the national human rights institution from contributing to its work, as that cooperation might lead to synergies and complementarity. For instance, the number of complaints received by the institution in relation to a specific place of detention may inform the work of the mechanism. Similarly, the mechanism could refer some cases to the institution for litigation or other action.

20. In order to strengthen national preventive mechanism efficiency, it is important to ensure that all stakeholders, particularly authorities and persons deprived of liberty, are aware of the mechanism's work and mandate. It is particularly important to ensure public understanding of the nature of its work and emphasize its preventive focus. The Subcommittee has witnessed different strategies used by national preventive mechanisms for that purpose, such as the conduct of public campaigns and development of a web page, a logo and uniforms to be used during monitoring visits.

21. Another issue to take into account is the principle of confidentiality, which should be respected in national preventive mechanism work. The decision to share information

with national human rights institution staff belongs to the mechanism, which should carefully consider the needs for the information on a case-by-case basis.

Opportunities for cooperation between the national preventive mechanism and the Subcommittee and support from the Subcommittee

22. The Subcommittee stands ready to provide advice and assistance, in particular through regular e-mail contact between the national preventive mechanism and the Subcommittee focal point in charge of that State party. Moreover, it is to be noted that the Subcommittee often participates in projects at the national level launched by other bodies specialized in prevention of torture, particularly at the initiative of civil society.

Best practices for the establishment of national preventive mechanisms

23. Public Subcommittee reports could be considered as a translation into practice of its guidelines on national preventive mechanisms (CAT/OP/12/5) and as interpretations of Optional Protocol requirements with respect to national preventive mechanisms. Moreover, at its twenty-sixth session, the Subcommittee decided to publish on its website a compilation of some of its answers to queries from national preventive mechanisms, on an anonymous basis, as a way of providing practical advice on mechanism-related issues.

IV. Body searches and pat-downs

24. The national preventive mechanism guidelines provide that the State should ensure that both the members of the national preventive mechanism and its staff enjoy such privileges as are necessary for the independent exercise of their functions (see CAT/OP/12/5, para. 26). While it is accepted that essential basic security measures are to be complied with for the benefit of all concerned, it is equally important that those working for the national preventive mechanism are not in any way restricted in their work and that they do not feel that they might be subject to any form of pressure. Routine body searches and pat-downs contravene the spirit of the Optional Protocol.

25. Members of the mechanism and its staff should only be subject to or exempt from searches in the same manner as other authorities with similar or equal privileges and immunities as those granted to members of the mechanism by the Optional Protocol and ought to include freedom from such searches.

V. National preventive mechanisms and cross-border monitoring of persons in detention

26. Should a State party to the Optional Protocol (a sending State) enter into an arrangement under which those detained by that State are to be held in facilities located in a third State (a receiving State), the Subcommittee considers that the sending State should ensure that such an agreement provides for its national preventive mechanism to have the legal and practical capacity to visit those detainees in accordance with the provisions of the Optional Protocol and the Subcommittee guidelines on national preventive mechanisms.

27. After undertaking such visits, the national preventive mechanism of the sending State should be able to present its recommendations and enter into a preventive dialogue with the authorities of both the sending and receiving State. The agreement entered into between the sending and receiving States should provide for that and should permit the variation of its terms in the light of the recommendations made.

28. In addition, the national preventive mechanism of the receiving State should also have the capacity to visit those in detention on the basis of such agreements, as a natural consequence of its general right to visit all those deprived of their liberty on the basis of public authority and under the jurisdiction and control of the State party.

29. After undertaking such visits, the national preventive mechanism of the receiving State should be able to present its recommendations and enter into a preventive dialogue with the authorities of both the receiving and sending State. The agreement entered into between the receiving and sending States should provide for that and should permit the variation of its terms in the light of the recommendations made.

30. The national preventive mechanisms of the sending and receiving States should liaise regarding the conduct of such visits, and should consider undertaking joint visits in such circumstances and, where possible, making joint recommendations.

31. The recommendations made ought to reflect the established approaches of the national preventive mechanisms in question, which themselves will reflect the approach of the Subcommittee and international standards. In cases where there is a difference of approach and expectation, the higher expectations will be applicable to those detained on the basis of such agreements as a reflection of the overarching principles of prevention.